

# Pedaling through it all

By Scott H.Z. Sumner

The impact of COVID-19 on collective indoor life, *especially* the closure of gyms, exercise clubs and classes, has been a major boon to the cycling industry.

When the Bay Area shelter order took effect, bicycle sales expanded dramatically, and bicycle mechanic work has exploded. The trend has followed shelter orders and pandemic awareness around the state and country.

Discussions with bicycle shops and mechanics yields accounts of bicycle sales being more than twice typical, while requests for bicycle maintenance and service are now met with delays of weeks, not days, as people who have not ridden in years (decades even) have been pulling old bicycles out of storage and bringing them to shops for repair.

While automobile traffic has been reduced due to COVID-19, there are still

plenty of opportunities for auto v. bicycle conflicts, and with the population of cyclists on roads now extending beyond commuters (whether from necessity or desire) and spandex-clad enthusiasts, there are more novice, or just out-of-practice, riders, on roads and trails.

Injured bicyclist cases present in markedly different ways than strictly motor vehicle cases. To begin with, because cyclists are so disadvantaged by weight and lack of a protective vehicle with crush zones, cyclists are usually whisked away by ambulance, and not interviewed by police on-scene, but later, and *after* a responding officer has already formed their personal impressions and conclusions without input from an injured cyclist.

## A Good But Unfavorable Police Report?

We all (hopefully) appreciate that the definition of a “good” police report has nothing to do with the reporting officer’s opinions and conclusions, and everything to do with the thoroughness of the evidence gathered, documented and preserved.

Personally, I attempt to assess every traffic case by reviewing the available evidence – statements, measurements, photographs, GPS coordinates – in a police report *before looking at the officer’s opinions and conclusions*. But that approach is especially crucial in bicycle cases: In nearly 30 years of practice, in all but a handful of cases, police reports blame the injured cyclist for events.

Google Street View makes it possible to appreciate an incident scene from an appropriate perspective without having to visit a scene, and now cover many paved

multi-use trails as well as roads. I use the feature in real time while meeting (or these days speaking) with new potential clients in all traffic cases. Historical Street View imagery can also be invaluable as well in documenting the age of dangerous conditions of roads, sidewalks and foliage. Many serious riders log rides on <https://www.strava.com/>. Always inquire, and where appropriate, you should review a client’s Strava data and other social media for evidence of your client’s demeanor as a cyclist, just as the defense may.

While police errors are not uncommon in traffic incidents, officers more often get it right in strictly motor vehicle cases. But for nearly every bicyclist I have represented, the reporting officer’s conclusions have been faulty and unfavorable. And even where the police officer gets it right, defense adjusters fill the gap by seeking to blame the cyclist.

Favorable witnesses are often not reflected in police reports, the adverse drivers always spend time on-scene speaking with the officer while the (often severely) injured cyclist is whisked away, and a pervasive bias colors the officer’s unfamiliarity with bicycling, regularly leading to a misapplication of the California Vehicle Code (“CVC”) to the parties.

A frequent example involves cars or trucks that have just passed by a cyclist riding on the shoulder or near the right edge of the roadway, and then sought to execute a turn or just move rightward in their lane of travel, cutting off or striking a cyclist in the process. Police officers then improbably and speculatively conclude the cyclist was ‘attempting to pass on the right,’ ‘traveling too fast for conditions,’ or ‘making an unsafe turning movement,’



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without recognizing the driver's obligation when "overtaking another vehicle proceeding in the same direction" is to "pass to the left at a safe distance *without interfering with the safe operation of the overtaken vehicle*" (CVC 21750) or the prohibition on a vehicle turning "from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety" (CVC 22017), which is not possible when the cyclist they just passed or are still passing is *right there*.

When confronted with a police report assigning fault to a cyclist for unsafe speed, unsafe turning movements, trying to pass on the right, etc., discovery in the case needs to focus on demonstrating the lack of evidence to support the application of those code sections:

- Adverse drivers may see a cyclist losing control and crashing as they are passing (or think they have already passed), but loss of control due to the actions of the adverse driver are not the same thing as a volitional turning movement, as most defense experts will have to admit in deposition;
- Cyclists are rarely going over the posted speed limit, and there can be no speed *legally* too fast for dealing with a vehicle that is overtaking and passing the cyclist, then cutting back into the cyclist's path; and
- A cyclist is not "trying to pass on the right" when a bicycle is still continuing on its path, but an automobile that has

just overtaken and passed the cyclist then slows for a right-hand turn. A car doesn't establish a legal right-of-way by virtue of having violated a bicyclist's right-of-way.

Drivers are required to make right turns "as close as practicable to the right-hand curb or edge of roadway" (CVC 22100(a)), but most drivers (*and* police officers) don't appreciate that a *designated* bicycle lane is a separate lane of travel and *is the curb lane*, so to cross a bicycle lane when turning, drivers are *required* to *safely* merge into the designated bike lane before making their turn. (CVC 21717.)

Demonstrating through testimony that neither the adverse driver, the police officer, nor the defense expert can provide foundational testimonial evidence to support the application of these codes requires careful planning and breaking down the elements of these code sections. It also requires having, or developing, the ability to experience events through the perspective of *both* participants: auto *and* an unprotected cyclist, navigating roads that are legally equally available to bicyclists and automobiles alike, but which automobile drivers seem to regard as their exclusive domain, and which all too often lack any design consideration of cyclists as road users, let alone actual bicycle infrastructure.

I want to stress that if you are not yourself a bicyclist, if you truly want to represent people from this community, you need to spend some time literally in the

shoes of your client – navigating traffic and experiencing the not uncommon ire of motorists. After all, it's your job to bring other drivers (jurors) to a place where they can appreciate both the perspective of a cyclist and the perspective of a prudent driver – what they could see, could anticipate, *should* anticipate.

### Prevalent Bias Against Cyclists

Recent research<sup>1</sup> has shown that more than half of drivers think cyclists are not fully human, consciously or unconsciously justifying hatred and aggression towards cyclists. Fifty-five percent of non-cyclists and even 30 percent of cyclists believed people who ride bicycles are not completely human, viewing cyclists as animals or cockroaches. Study respondents even self-reported yelling at, gesturing rudely at, and driving too close to cyclists, and even to deliberately blocking cyclists with a car, cutting cyclists off, or throwing objects at them.

Thus, these underlying biases are not just held by police officers and insurance adjusters, but are prevalent in your jury pool. The good news is that individual juror's general perception of cyclists do not (in my experience) color their view of a person who appears before them in court as a normal, walking, talking human (not in spandex and a bike helmet) – and one who was injured often through no fault of their own (despite what the inadmissible police report might say).<sup>2</sup>

These biases do, however, represent a transactional cost you must consider in choosing to represent a bicyclist – injured cyclist's cases are more likely to be litigated, and costs are likely to be higher

than in strictly auto cases. But what many plaintiff's attorneys seem not to appreciate is that because bicyclist's injuries and damages are often substantial, many adverse drivers' policies are inadequate to redress the harm, such that many of these cases will resolve relatively promptly because the risk outweighs the benefits for a carrier to contest the matter, and hopefully, your client has higher underinsured coverage.<sup>3</sup>

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It appears strongly to me that many of my colleagues unconsciously allow these biases to dissuade them from good cases with good evidence. Many cyclists I have represented through the years have come to me after their cases were either rejected by other firms/lawyers, or because their prior counsel have been swayed by a police officer's misplaced opinion, and have then expressed agreement with or misplaced emphasis on the officer's conclusions or an adjuster's negative attitude.

### Excluding Officer's (Misplaced) Opinions

The high incidence of unreasonably unfavorable traffic collision reports spotlights the need to focus on the inadmissibility of police reports (CVC 20013) and generally of officer's opinions and conclusions – a role we often see defense counsel assuming in motor vehicle only collisions.

A jury that does not *hear* a police officer's mistaken conclusions/opinions is likely to view well-presented and relevant evidence in a very different light than the officer who only heard one side of the story before forming those conclusions/opinions (or the adjuster and even defense counsel focused on the inadmissible aspects of the officer's report).<sup>4</sup>

Preventing a police officer's opinion from coming into evidence is not something to attend to as trial approaches. Rather, it requires work and planning from the outset – gathering evidence informally prior to notifying the adverse carrier or instituting litigation. You should take the initiative in deposing reporting police officers, and do so with a planned approach after learning what you can about their background and experience before the deposition, and reading the case law in this area, so that you can lay the foundation for a successful motion in limine to exclude their testimony, and undermine defense efforts to do the opposite.

An officer who is *not* disclosed as a non-retained expert is limited to opining as a lay witness. C.C.P. § 2034.300 (a), which permits only an opinion that is rationally based on the perception of the witness (Evid. Code § 800), meaning physical evidence observed by the officer where the officer did not personally observe the incident. Thus, a carefully planned deposition approach will provide evidence establishing what the officer did not see.

However, a police officer who *is* disclosed under C.C.P. § 2034, and *who also qualifies as an expert witness* may give an opinion on factors such as speed involved for conditions. (*Hart v. Wielt* (1970) 4 Cal. App.3d 224.) However, a police officer's opinion regarding the *cause* of collision that was derived from interviews with witnesses at the scene, rather than from the officer's personal observation of the accident, is properly excluded. (*Stickel v. San Diego Elec. Ry. Co.* (1948) 32 Cal.2d 157, 165.)

Similarly, while a defense accident reconstruction expert can testify that they relied on the traffic collision report in formulating their own opinions, they may not testify as to any inadmissible details of the report including, but not limited to, the officer's opinions. (Cal. Practice Guide, *Civ. Trials & Evid.* (The Rutter Group 2008) 8:763, p. 8C-100.9.)

### 3 Feet for Safety

One of the best things to happen to cyclists in years was the codification of the "Three Feet for Safety Act," CVC 21760. The basic provision of the statute is that when overtaking or passing a bicycle, drivers must do so at a distance of not "less than

three feet between any part of the motor vehicle and any part of the bicycle or its operator." This means no less than 3 feet between the reach of a side-view mirror and the cyclist's arms or bicycle handlebars, as these are typically the nearest respective parts of each vehicle or operator. Importantly, this statute applies even when a motor vehicle is passing a cyclist riding on an elevated sidewalk or separated path, as the 3 foot minimum overtaking/passing mandate does not require the bicycle and auto to be on the same surface, but only that both vehicles are "proceeding in the same direction on a highway" (CVC 21760(b)), and a sidewalk *is* a "portion of a highway." (CVC 555.)

However, overtaking and passing at no less than 3 feet is not the sole requirement of the Act, as drivers are also required to overtake and pass in a way "that does *not interfere with the safe operation of the overtaken bicycle*" and also *exercise due regard for "the size and speed of the motor vehicle and the bicycle,"* as well as "traffic conditions, weather, *visibility, and the surface and width of the highway.*"

Thus, a big rig has to take into account its size and air displacement, and the potential effect of the wind forces it generates interfering with the cyclist's safe operation. Bicyclists, motorcyclists, pedestrians and even other automobiles can feel a push and pull of air as large trucks pass, and the closer the truck, the greater the aerodynamic forces. The blunt face of a truck acts like a fast-moving bulldozer, creating a zone of high pressure, pushing air away from it, along with adjacent objects (or bicycles and people). At the end of the cab or trailer, the opposite effect of the high-pressure zone at the front develops; the airflow is confronted with an abrupt turn that it cannot negotiate, and a low-pressure zone develops, pulling adjacent bodies towards it.

These other statutory details also mean overtaking and passing drivers must take into account road conditions, debris, and any factors present that could reasonably be known to potentially affect the safe operation of the bicycle the driver is *approaching*. So a car would have to wait to pass, or pass at an even greater distance, if the road width narrows ahead of the cyclist, such that the cyclist cannot maintain their position relative to the automobile during the entire passing maneuver.

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Explained most simply, the law requires motorists overtaking and passing bicycles to consider the cyclist's circumstances throughout the entire overtaking and passing maneuver and, if they cannot, to just exhibit a little patience. It is frequently compelling to explain to a jury how little time a motorist would have lost had they simply waited until they could safely pass – a seed you can plant in *voir dire*, water in opening, and bring to fruit in the testimony of both your own expert *and* the defense expert.

### **Video Evidence, Cellphones, Bicycle Computers**

Along with the increasing prevalence of video evidence from witnesses or bystanders, many businesses and even governmental agencies have cameras that may – if the case comes to you early and you act quickly – provide crucial evidence to escape the one-said/the-other-said dispute between the driver and cyclist.

Many serious cyclists have bicycle computers that record speed, course, etc., and there are applications marketed for smart phones that serve the same function. Even without an app in use, cellphone location data can potentially help resolve point of impact disputes since an offending automobile continues moving after an encounter with a small, lightweight bicycle and rider, especially in a passing encounter.

Apple's Siri voice function can be set up to permit a command phrase to trigger the camera and microphone to begin recording. This can be used to trigger recording when being pulled over by the police, or cyclists can use it to record encounters with motorists, and automatically send the recording to a designated contact.<sup>5</sup> Drivers often say things revealing culpability on the scene that conflict with what they say once a police officer arrives or later in a case – like telling the cyclist “you came out of nowhere” but later claiming to have been fully aware of the cyclist's presence.

I've had cases where an adverse driver engaged in text messaging with my clients or their spouse, and transmitted information that was inconsistent with the driver's later testimony.

Finally, and rarely, but increasingly, regular cyclists are employing GoPro or similar cameras, including Cycliq<sup>6</sup> brand front and rear facing lights that also record

constantly, and preserve the last crucial moments of video evidence in the event of a crash.

### **Sidewalk Ordinances**

Fear is, by far, the biggest motivator for cyclists choosing the sidewalk over roads. Cars often don't understand the rights of bicycles to be on roadways, and don't give bicycles the respect and space they are

legally entitled to on the roadways.

When a bicyclist on a sidewalk is struck by a vehicle coming out of or turning in to a driveway, police and/or insurance adjusters routinely seek to rely on local ordinances against bicycling on sidewalks to impute fault to such bicyclists.

That is a misapplication of any such ordinance.

The California Vehicle Code expressly leaves it up to individual jurisdictions to

determine their own rules for bicycles and sidewalks, and many cities throughout California permit bicycles to ride on sidewalks. (Veh. Code § 21206.) Indeed, the California Vehicle Code expressly “does not prohibit the operation of bicycles on ... any sidewalk ... where the operation is not otherwise prohibited by this code or local ordinance.” (Veh. Code § 21650(g).)

In some jurisdictions, children are expressly permitted to ride on sidewalks, or bicyclists are permitted to do so except in commercial zones. A city local to me permits all bicycles to ride on sidewalks *except* “in front of stores, schools, or buildings used for business purposes,” and permits bicycles with wheels 20 inches in diameter or less to ride even on those sidewalks.

But even where local ordinances prohibit bicycles on sidewalks, the *purpose* of such ordinances is not the prevention of vehicle collisions on sidewalks, but rather to either reduce the incidence of bicycle traffic on sidewalks in commercial areas where pedestrian traffic could rationally be expected to be of higher incidence, or

simply to prevent conflict between pedestrians and bicycles.

Put another way, an adverse driver is not entitled to rely on such an ordinance to avoid liability because (1) the ordinances are not “designed to prevent ... an occurrence of the nature” of the subject incident, and (2) a driver exiting a driveway that crosses a sidewalk is not “one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.” (Evid. Code § 699; *Galvez v. Frields* (2001) 88 Cal.App.4th 1410; *Daum v. Spinecare Medical Group* (1997) 52 Cal.App.4th 1285, 1306; *Huang v. Garner* (1984) 157 Cal.App.3d 404, 413-414.)

In no case does the existence of a no-bicycle sidewalk ordinance absolve a driver from the need to account for sidewalk users before crossing the sidewalk.

If a child can ride on the sidewalks, and if pedestrians are permitted to use sidewalks for running/jogging, a bicycle or other user can reasonably be anticipated to be present and coming *from either available direction*. (It is error to instruct a jury “that riding a bicycle on the sidewalk in

the opposite direction of the street traffic” violates the Vehicle Code, since the Vehicle Code does not require a bicyclist on a sidewalk “to ride in the same direction as the vehicular traffic.” (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 268.) Indeed, an adult on a bicycle is more visible than a pedestrian.

CVC 21952 requires that prior to driving over or upon any sidewalk, a driver shall yield the right-of-way to any pedestrian approaching thereon. CVC 21804 provides that a driver seeking to enter a roadway “from any public or private property ... shall yield the right-of-way to all traffic ... close enough to constitute an immediate hazard, and shall continue to yield the right-of-way to that traffic until he or she can proceed with reasonable safety.”

Notably, Google Street view imagery provides an excellent resource for finding pictures of bicyclists using sidewalks, which is extremely common on sidewalks along high-volume roads with little to no shoulder, and no bicycle lane. Such images take your client out of the role of solitary law breaker and place them in a context of ordinary, reasonable (reasonably fearful) and prudent persons – the very standard the judge will instruct jurors to consider. ■

<sup>1</sup> <https://www.sciencedirect.com/science/article/abs/pii/S1369847818308593>

<sup>2</sup> I do recommend not permitting your client to ride their bicycle to court, assuming they are back to riding by time of trial, and the best photographs of them as a cyclist are those not of them helmeted and riding (insect-like), but instead of them sharing a mid-ride break with their friends, in cycling attire, fine, but not hiding behind sunglasses and helmets and looking less than human.

<sup>3</sup> One service we should all extend to friends and clients, but especially to cyclist friends and clients, is to urge them to carry higher UM/UIM limits to protect themselves from otherwise uncovered losses.

<sup>4</sup> Motions in limine to exclude improper opinion testimony and planning for their implementation will be freely shared with anyone who confronts this issue if they reach out to me personally.

<sup>5</sup> <https://www.cnet.com/how-to/your-iphone-can-auto-record-your-police-encounters-through-a-siri-shortcut-heres-how/>; [https://www.reddit.com/r/shortcuts/comments/9huqiw/getting\\_pulled\\_over\\_by\\_police/](https://www.reddit.com/r/shortcuts/comments/9huqiw/getting_pulled_over_by_police/) (My iPhone help-phrase is “Siri, I may need help.”)

<sup>6</sup> <https://cycliq.com/>